NO. 92-74

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN, in his Capacity as Director of the Department of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPORTATION CORPORATION; GENERAL ELECTRIC RAILCAR SERVICES CORPORATION; PULLMAN LEASING COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER TRAIN COMPANY; UNION TANK CAR COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, FLORIDA, IDAHO, KENTUCKY, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WISCONSIN AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(1) Whether a state imposes a discriminatory tax on railroad property, in violation of section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, if it exempts any class of property not owned by the railroad from ad valorem property taxes;

(2) If the state's tax is discriminatory, whether the railroad is entitled to be exempt from all ad valorem property taxes.

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INTEREST OF THE AMICI

Washington and the other named States submit this brief as *amicus curiae* in support of the position of the petitioner, Oregon, before this Court, which seeks the reversal and remand of the judgment of the United States Court of Appeals for the Ninth Circuit in *ACF Indus., Inc. v. Department of Rev.*, 961 F.2d 813 (9th Cir. 1992). The amici States fall within the jurisdictional boundaries of several of the federal circuits. This brief is submitted on behalf of Washington, Arizona, California, Florida, Idaho, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Vermont, Virginia, Wisconsin and Wyoming by their attorneys general. Accordingly, consent to its filing is not required. SUP. CT. R. 37.5.

The principal issue before the Court is whether a state must be deemed to have imposed a discriminatory tax upon railroad property in violation of the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act") when the state's laws exempt from property taxes any class of property of a type not owned by a railroad.

Railroads and carlines carry on extensive transportation operations within the amici States which represent a significant presence in terms of property and personnel and a concomitant obligation on the part of state and local governments to provide essential services.[1] Ad valorem property taxes are an integral part of the revenue systems of

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[1]For 1991 railroad net investment in road and equipment nationwide was reported to exceed $48 billion. For Class I line-haul railroads operating railroad mileage of 62,238 miles and railroad employment of 106,653 persons were assignable to the amici States. AMERICAN ASSOCIATION OF RAILROADS, RAILROAD FACTS, 42, 44, 57 (1992 ed.). Class I railroads, while comprising 2% of the nation's railroads, in 1991 generated 91% of freight revenues and accounted for 89% of railroad employment and 75% of mileage operated. *Id.*, at 3.

these States.[2] Like Oregon, the amici States have traditionally allowed property tax exemptions to encourage economic development within their borders, some of which will be enjoyed by railroads and carlines as well as other businesses. Additional exemptions will still be available to railroads and carlines (as well as to other businesses) but may not be taken advantage of by them in the conduct of rail transportation.

Were the decision below to be allowed to stand and to be adopted by other circuits, the amici States would then be put to an election Congress could never have intended: either to confine exemptions to the types of property owned by railroads, and then only in proportion to the benefits enjoyed by the railroads from such exemptions, or to forego altogether collection of property taxes from railroads. In this regard, the amici States take strong exception to the remedy afforded by the Ninth Circuit below, and concur in the brief submitted by Oregon, as petitioner, on the matter. Of further concern is the potential for application of the principles of the Ninth Circuit's decision regarding exemptions, not only to property taxes but to other statutory sources of revenue looked to by the states.

A broader concern of the amici States, and all states, is highlighted by the treatment given by the Ninth Circuit to the threshold issue in this case—whether Congress ever intended to constrict the states' exercise of their taxing pow-

[2]For the fiscal year ended June 30, 1991, property taxes constituted 75% of all tax revenues collected nationwide for the support of local (as opposed to state) governments and other taxing districts. Property tax collections in the amici States during the same period for both state and local governments approximated $81.6 billion. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, GOVERNMENT FINANCES: 1990-91 (PRELIMINARY REPORT), at 1. Information taken from ICC compilations for 1991 indicate that Class I line-haul railroads paid property taxes in the amount of $334,355,000. OFFICE OF ECONOMICS, INTERSTATE COMMERCE COMM'N, TRANSPORT STATISTICS IN THE U.S.: RAILROAD COMPANIES AND MOTOR CARRIER SUBJECT TO THE INTERSTATE COMMERCE ACT, Part I, Table 5, at 10 (Dec. 31, 1991).

ers to the degree determined by the lower court. An accelerating trend of federal pre-emption of state regulatory and taxing powers, even as additional responsibilities are shifted from the national government, has been well-documented.[3] In this current climate of federalism, the states should not be made to suffer the consequences of prohibitions on the use of their powers, otherwise sovereign, that were never intended.

SUMMARY OF ARGUMENT

1. In 1961, Congress began its inquiry into the matter of tax discrimination against railroads by the states, which culminated in the Railroad Revitalization and Regulatory Reform Act of 1976. From the outset and in the earlier years of this period, Congress focused upon the issues of disparate property assessment practices and differential tax rates in state ad valorem property taxation. This was the genesis of the language now found in 49 U.S.C. § 11503(b)(1)-(3).

2. Toward the end of its 15-year trek through Congress, the House appended language to the 4R Act, eventually codified in 49 U.S.C. § 11503(b)(4), which, in general terms, prohibits states and their subdivisions from imposing "another tax" that discriminates against rail carriers. Subsection (b)(4)'s reference to "another tax" must be considered in context with the explicit language in the immediately preceding subsections of the statute, which are directed only to ad valorem property taxes and the features thereof that constitute statutory discrimination, but in which Congress clearly accommodated the states' interest in granting property tax exemptions.

3. The plain and ordinary meaning of the "another tax" provision cannot be read to apply to property taxes, as

[3]*See generally* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL STATUTORY PRE-EMPTION OF STATE AND LOCAL AUTHORITY: HISTORY, INVENTORY, AND ISSUES (1992).

the Ninth Circuit interpreted subsection (b)(4), to render discriminatory property tax exemptions which, traditionally, are an integral part of state property tax systems. While resort to legislative history is not essential to the Court's decision, the history fully supports the conclusion that only taxes *other* than property taxes are the subject of § 11503(b)(4). There is accordingly no need for this Court to consider the test for discrimination or the scope of its remedy as would be required if such other taxes were under review.

4. In refusing to apply the plain language of the statutory provision, the Ninth Circuit also chose to ignore recognized principles of construction this Court has continually applied to avoid an unintended imbalance between federal interests and traditional state prerogatives, *e.g.*, discretion in the exercise of the taxing power. If the language of § 11503, fairly interpreted, does not remedy forms of discrimination alleged by the rail industry to exist, that constituency should not receive from the courts relief for a problem which Congress either did not view as a concern or impliedly chose not to grant in the legislative process.

ARGUMENT

I. The Term "Another Tax" Plainly Requires That Section 11503(b)(4) Only Be Applied to Taxes Different Than the Tax Addressed Before—*i.e.*, Property Taxes.

Section 11503(b)(4) of the 4R Act follows in sequence subsections (b)(1)-(3), which proscribe discriminatory property taxes,[4] and prohibits the imposition of "another

[4]Subsection (b)(1) addresses property tax assessments; subsection (b)(2) addresses the levy and collection of property taxes; and subsection (b)(3) addresses property tax rates.

tax" that discriminates against a rail carrier.[5] "[T]he language employed by Congress" is the starting point in all cases of statutory construction and this Court "assume[s] that the legislative purpose is expressed by the ordinary meaning of the words used." *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). As used in subsection (b)(4), "another tax" is limited to a tax different or distinct from the ad valorem property tax that is governed by the assessment ratio, collection, levy and tax rate restrictions of § 11503(b)(1)-(3).[6]

As used in the context of § 11503(b), "another" means "different or distinct from the one first named or considered[.]" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 89 (1971). Similarly, as used in the context of § 306(1)(d), "other" means different or distinct. WEBSTER'S

[5]49 U.S.C. § 11503 is the recodification of § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54, first codified at 49 U.S.C. § 26c (1976). The original Act was recodified in 1978. *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. The text of both § 11503 and § 306 is provided in the Appendix.

The language of the recodification differs slightly from the original language of § 306. For example, § 306(1)(d), the provision corresponding to § 11503(b)(4), prohibited "[t]he imposition of *any other* tax which results in discriminatory treatment of a common carrier by railroad" (emphasis added). Such changes "may not be construed as making a substantive change in the laws replaced." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987). Therefore, § 11503(b)(4) should be interpreted in light of the language of § 306(1)(d), and the two versions of the statute should be harmonized to the extent possible, with any unavoidable conflicts resolved in favor of the original language. *See, e.g., Southern Ry. v. State Bd. of Equalization*, 715 F.2d 522, 523-24 n.1 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

[6]This is the natural manner in which the phrases "another tax" or "other tax" ordinarily are used: to refer to a *different tax* than mentioned earlier. *See Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 128, 132, 133, 134 (1987) ("In order to be an 'in lieu tax,' the court reasoned, the flight property tax must be a substitute for *another tax* on flight property. . . . [T]he phrase 'in lieu tax' restricts the protection of

THIRD NEW INTERNATIONAL DICTIONARY 1598 (1971) defines "other" as "not being the one (as of two or more) first mentioned or of primary concern : . . . being the ones distinct from the one or those first mentioned or understood . . . not the same : DIFFERENT . . ." BLACK'S LAW DICTIONARY 1253 (4th ed. 1968) defines "other" as "[d]ifferent or distinct from that already mentioned; additional or further."[7]

In the context of § 11503(b)(4), "tax" means a legislative enactment imposing on persons a pecuniary burden to raise revenues for the general support of government. *See Union*

§ 1513(d)(3) to property taxes applied to the exclusion of *any other tax* on the property, in other words, to taxes applied in lieu of *any other possible property tax*. . . . The South Dakota Airline Flight Property Tax establishes a method of taxing a particular type of property to the exclusion of *any other tax* on that property. . . . Appellants advocate the position taken by the Supreme Court of South Dakota, that in order to be exempted under this provision a tax must take the place of *another tax* that historically had been applied to the airline property. The fact that a property tax is applied to the exclusion of *all other property taxes* is immaterial, appellants assert, unless some past tax was actually replaced by the present tax. . . . Why a State that has consistently chosen to levy, to the exclusion of *all other property taxes*, a tax utilized wholly for aeronautical purposes should be penalized for its consistency is unexplained. . . . Appellants do not suggest—and have no basis upon which to suggest—that in order to be an 'in lieu tax' under § 1513(d)(3) the airline flight property tax must have replaced *some other tax* by the effective date of the federal provision. If one tax must replace *another*, therefore, the replacement could take place at any time. . . . This exercise of replacing one tax with *another*, while contributing somewhat to a state legislature's workload, would contribute nothing to the policies of the Airport and Airline Improvement Act. . . . [Section] 1513(d)(3) exempts from the antidiscrimination provisions of § 1513(d)(1) a tax on airline flight property, applied to the exclusion of *any other possible tax* on that property, the proceeds of which are wholly utilized for airport and aeronautical purposes") (emphasis added).

[7]Reliance on dictionary definitions is not uncommon in this Court's opinions. *See, e.g., Deal v. United States*, 113 S. Ct. 1993, 1996 (1993); *Arave v. Creech*, 113 S. Ct. 1534, 1541 (1993); *see also id.*, at 1547 (Blackman, J., dissenting).

Pac. R.R. v. Public Util. Comm'n, 899 F.2d 854, 858-59 (9th Cir. 1990); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2345 (1971)(A "tax" is a "pecuniary charge imposed by legislative or other public authority upon persons or property for public purposes : a forced contribution of wealth to meet the public needs of a government"); BLACK'S LAW DICTIONARY 1628 (4th ed. 1968)(A "tax" is "[a] pecuniary burden laid upon individuals or property to support the government, and is a payment exacted by legislative authority").

Construing subsection (b)(4) as it is plainly worded recognizes that Congress, in addition to the property tax prohibitions set out in subsections (b)(1)-(3), intended to forbid discriminatory taxes different or distinct from the property tax it had already addressed.[8] This plain reading of § 11503(b) comports with the Court's direction in *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987) that the language of § 11503 must "be regarded as conclusive" where the terms of the statute are unambiguous. *Id.*, at 461.

When Congress has used the words "other" and "taxes" together in other statutes, it has used these terms to mean different taxes and not, as argued by railroads and carlines, different tax provisions. For example, the Airport Development Acceleration Act of 1973 prohibits states from levying or collecting "a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom[.]" 49 U.S.C. § 1513(a). The Act goes on to provide, however, that "nothing in this

[8]*See, e.g., Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991) in which the Seventh Circuit, in a case involving an occupational tax, concluded that subsection (b)(4) applies to *another* type of tax rather than a property tax.

section shall prohibit a State . . . from the levy or collection of *taxes other than those enumerated in subsection (a)* of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services[.]" 49 U.S.C. § 1513(b)(emphasis added). *See Aloha Airlines, Inc. v. Director of Tax'n*, 464 U.S. 7, 12 n.6 (1983)("While neither the statute nor its legislative history explains exactly why Congress chose to distinguish between gross receipt taxes and the taxes reserved in § 1513(b), the statute is quite clear that Congress chose to make the distinction, and the courts are obliged to honor this congressional choice").

The conclusion that Congress employed the word "other" in subsection (b)(4) to refer to taxes different than property taxes also promotes the rule of construction that the general language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957)("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment")(internal quotations omitted).[9]

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[9]*See also Cami v. Central Victoria, Ltd.*, 268 U.S. 469 (1925) in which the Court construed a statute containing the phrase "any other impost, excise or tax" in accord with the rule that general statutory language should not be construed to defeat specific statutory language:

> [I]t is difficult for us to believe that in one paragraph the latter Act gave power to tax up to a specified maximum and in another a general power limited only by the other principles of taxation. Therefore when in § 49(f) the later Act allows "any other impost, excise or tax" we think it must be taken to mean any tax on other objects of taxation, not any other tax on those for which a limit already definitely is prescribed.

Id., at 471.

In § 11503, subsections (b)(1)-(3) specifically address discriminatory property taxes and reference the same specific comparison class of "commercial and industrial property." In stark contrast, subsection (b)(4) is indisputably general. In subsection (b)(4), Congress has said that "impos[ing] another tax that discriminates" is a prohibited act that "discriminate[s] against interstate commerce[.]" *See* 49 U.S.C. § 11503(b) and (b)(4). Congress could not have been more general in subsection (b)(4) than to have prohibited as discriminatory "another tax that discriminates." Accordingly, since subsections (b)(1)-(3) specifically deal with property taxes, the broad general language of subsection (b)(4) should not be deemed to embrace the same subject matter.

In *Burlington N. R.R. v. Oklahoma Tax Comm'n*, *supra*, this Court rejected a proposed interpretation of the 4R Act that "depends upon the addition of words to a statutory provision which is complete as it stands" and that "would require amendment rather than construction of the statute[.]" 481 U.S., at 463. The Court should similarly reject a proposed interpretation of § 11503(b)(4) that depends upon the subtraction of the word "another" from the statutory provision, thus requiring judicial amendment of § 11503 rather than its construction. *See United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992)("[A] statute must, if possible, be construed in such fashion that every word has some operative effect"). Accordingly, this Court should hold that by its plain language subsection (b)(4) does not address claims involving property taxes.

II. The Interest of The States in Adapting Their Tax Systems to Particular Needs Warrants a Careful Scrutiny of Federal Statutes Claimed to Have Substantially Limited State Options.

As we have shown, subsection (b)(4) to 49 U.S.C. § 11503 concludes the listing of prohibited acts by a state,

which are deemed to unreasonably burden and discriminate against interstate commerce, by prohibiting the imposition of "another tax" that discriminates against a rail carrier. This final limitation follows those in the preceding subsections directed at ad valorem property tax actions, in the definition of which, Congress, through careful draftsmanship, allowed states to exempt property from such taxes. Thus, in urging that this juxtaposition of the subsections be ignored, respondents would have this Court disregard also the relevant principles of statutory construction, including those to be applied when the bounds of Congress' intervention into the realm of traditional state prerogatives must be set.

A. The Court Need Not Proceed Beyond the Unambiguous Language of the Statutory Phrase, as a Principle of Construction, to Resolve the Issue in This Case.

The language of § 11503 is pre-emptive in nature. That fact alone, in respondents' view, permits an expansive construction of the term "another tax" in the face of its plain meaning on the theory that remedial legislation is involved. Resp. Brief in Opp. to Pet. for Cert., at 6.[10] However, the degree of pre-emption plainly remains for the courts to fathom. The result of such inquiry leads inevitably to the conclusion that property taxes are not comprehended by subsection (b)(4), whether the analysis is confined simply to the "text, structure, purposes, and subject matter of the statutes involved[,]" or abetted by a stricter construction of pre-emptive language when the federal-state balance is involved. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608,

[10]Recognizing the existence of a countervailing requirement of clear and manifest intent for Congressional pre-emption of state powers, respondents argue, facilely, that this principle is absent from the case, because "Congress has itself struck the balance." The nature of that balance is, of course, the issue now before the Court.

2632 (1992)(Scalia, J., concurring in the judgment in part and dissenting in part).

> As the Court has stated, as recently as its past Term:
>
> If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732, 1737 (1993).[11]

B. Well-Established Pre-Emption Analysis Requires Clear Evidence of Congressional Purpose to Avoid Unintended Impingement on State Prerogatives.

Were the plain wording principle of construction assumed *arguendo* to be inadequate for the interpretive task, then the general principles of pre-emption analysis consistently employed by this Court would become directly relevant. Unquestionably, when state statutes conflict with, or frustrate, federal law, the Supremacy Clause commands that they give way. However, this Court has consistently required of Congress a "clear and manifest purpose" in testing for pre-emption and its scope to avoid "unintended encroachment on the authority of the States[.]" *CSX Transp., Inc. v. Easterwood*, 113 S. Ct., at 1737. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also Reid v. Colorado*, 187 U.S. 137, 148 (1902).

In *Cipollone*, *supra*, this Court stated that "[c]onsideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by [a] Federal Act unless

[11]As demonstrated, *infra*, at 26-27, a straight-forward construction of the statutory language at issue is neither so absurd nor illogical that the Court should reject its plain meaning. *See, e.g., Conroy v. Aniskoff*, 113 S. Ct. 1562, 1566 (1993).

that is the clear and manifest purpose of Congress." 112 S. Ct., at 2617 (internal quotations omitted). This Court further reminded that the strong presumption against pre-emption requires a fair but narrow construction of the statutory language being considered. *Id.*, at 2621; *see also id.*, at 2626 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part)("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously. . . . We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language").

In its pre-emption inquiry, the Court has clearly and properly accorded the states' historic taxing prerogatives the same recognition it has extended to the application of their police powers. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986). Long ago this Court underscored the fundamental nature of the states' taxing power. *Railroad Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 29 (1873) ("And in thus acknowledging the extent of the power to tax belonging to the States, we have declared that it is indispensable to their continued existence"); *Bull v. United States*, 295 U.S. 247, 259 (1935)("[T]axes are the life-blood of government").[12]

There is nothing explicit or sufficiently implied in the particular prohibition legislated in § 11503(b)(4) to justify the conclusion that Congress has clearly and manifestly

[12]*See also Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527 (1959) where this Court cautioned against subjecting the taxing power of a state to "intolerable supervision." The caution the Court employs in defining the reach of Congressional action so as not to "upset the usual constitutional balance of federal and state powers" is not unlike the care it exhibits in its Tenth Amendment analysis. *See New York v. United States*, 112 S. Ct. 2408, 2425 (1992).

foreclosed the states from tailoring their property tax systems other than in the manner elsewhere provided in the statute.

C. The Limited Jurisdictional Exception Drawn by Section 11503 Itself Counsels Against a Broad Pre-Emptive Reading of Its Provisions.

Section 11503 is a limited exception to the general Congressional policy of noninterference with state tax systems. The Tax Injunction Act, 28 U.S.C. § 1341, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

So pervasive is the policy behind the Tax Injunction Act—that federal courts should not interfere in state tax matters—that exceptions to the Act should be read narrowly.

The strength of the policy behind the Tax Injunction Act has been acknowledged by this Court on several occasions. *See, e.g., Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) ("[T]he statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations"); *California v. Grace Brethren Church*, 457 U.S. 393, 409-10 (1982)(The states generally must be left free to fashion a coherent system of revenue collection or face fiscal chaos). *See also Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 522 (1981).

The principles of comity which inhere in the Court's pre-emption analysis have precluded exceptions to the Tax Injunction Act, even in the face, for example, of the general statutory grant of power to a federal court to enjoin unconstitutional state practices in 42 U.S.C. § 1983. In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) this Court barred taxpayer damage actions in federal courts under § 1983 to redress the allegedly unconstitutional administration of a state tax system.

Of course, § 11503(c) expressly states that despite the Tax Injunction Act, the district courts may grant the relief specified in that section.[13] However, when this Court has held that the important right of § 1983 access to federal courts to challenge a state's unconstitutional practices must yield to the policy of the Tax Injunction Act, then any exception to the Act should be construed narrowly, not expansively. *See California v. Grace Brethren Church*, 457 U.S., at 413 ("In order to accommodate these concerns and to be faithful to the congressional intent 'to limit drastically' federal-court interference with state tax systems, we must construe narrowly the 'plain, speedy and efficient' exception to the Tax Injunction Act"); *Chesapeake W. Ry. v. Forst*, 938 F.2d 528, 531 (4th Cir. 1991)("While § [11503] was passed as an express exception to the policy of non-interference, we are not inclined to disregard this general policy in areas where § [11503] does not plainly authorize such an exception"), *cert. denied*, 112 S. Ct. 1577 (1992).

III. The Legislative History Supports the Plain Language of Section 11503(b)(4).

As demonstrated in the foregoing sections, there is ample basis for the Court to dispose of the interpretive issue in this case through application of the plain meaning rule of construction, without invoking its established pre-emption analysis. Whatever the role of these two canons of construction, the conclusion is compelled that in § 11503(b)(4) Congress did not intend to address the question of property taxes. While recourse to legislative history should not be necessary, the subject of property taxes was given close at-

[13]Section 11503(c) specifically provides: "Notwithstanding section 1341 of title 28 . . . a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States to prevent a violation of subsection (b) of this section."

tention by Congress, but solely in the drafting of other subsections of the statute.

As discussed in Section I of this argument, the unambiguous language of § 11503(b)(4) plainly applies only to taxes *other* than ad valorem property taxes. This reading of the statute's clear language is consistent with the 4R Act's legislative history which confirms that Congress did not intend to address property tax discrimination in subsection (b)(4).[14] In fact, the legislative history strongly suggests that Congress intended the prohibition of subsection (b)(4) to be much more limited than revealed by the language used in the subsection. Rather than broadly applying to all other non-property taxes, it appears that Congress intended subsection (b)(4) to reach only discriminatory taxes imposed "in lieu of" property taxes.[15]

Although the genesis of some of the 4R Act's tax provisions date back to 1961,[16] the "any other tax" provision does

[14]Given the unambiguous statutory command found in subsection (b)(4), resort to legislative history is not necessary. *Burlington N. R.R.v. Oklahoma Tax Comm'n*, 481 U.S., at 461. Should the Court nonetheless look behind the plain language of subsection (b)(4), it will find the legislative history regarding subsection (b)(4) to be sparse. Indeed, § 11503 "as one small part of the massive [4R Act], actually received scant attention in the legislative history produced by the 94th Congress." *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 128 n.1 (4th Cir. 1983). However, as demonstrated in this section of the argument, what legislative history there is does not reveal any Congressional intent whatsoever to address through subsection (b)(4) the property tax exemption claim raised by the plaintiff carlines against Oregon.

[15]This Court, however, needs only to decide whether subsection (b)(4) applies to property taxes. Because the plaintiff carlines' subsection (b)(4) claim is based on alleged personal property tax exemption discrimination only, it is not necessary for the Court in this case to determine what *other* taxes subsection (b)(4) may apply to.

[16]*See National Transportation Policy, Report of the Committee on Commerce, United States Senate by its Special Study Group on Transportation Policies in the United States,* No. 87-445, 87th Cong., 1st Sess. (1961).

not appear in the legislative record until February 19, 1974, about two years before enactment of the legislation. The relevant portion of that House bill, H.R. 12891, 93d Cong., 2d Sess. (1974), provided:

> (2) Notwithstanding the provisions of section 202(b) of this Act, the following actions by any State, or subdivision or agency thereof, whether taken pursuant to a constitutional provision, statute, administrative order, or practice, or otherwise, constitute an unreasonable and unjust discrimination against, and undue burden upon interstate commerce and are prohibited:
>
> . . .
>
> *(d) the imposition of any other tax which results in discriminatory treatment of a carrier subject to part I or part III of the Interstate Commerce Act.*

Hearings on H.R. 12891, H.R. 5385, H.R. 13487, H.R. 10694 and S. 1149 Before the Committee on Interstate and Foreign Commerce and the Subcommittee on Transportation and Aeronautics, No. 93-85, 93d Cong., 2d Sess. 24 (1974)(emphasis added).

After the "any other tax" provision appeared in H.R. 12891, the same or a similar provision appeared in most other House precursors of the 4R Act until its enactment. *See, e.g.*, H.R. 5385, 93d Cong., 2d Sess. (1974); H.R. 6351, 94th Cong., 1st Sess. (1975); H.R. 7681, 94th Cong., 1st Sess. (1975); H.R. 10979, 94th Cong., 1st Sess. (1975). Congress' intent in adding the "any other tax" provision was not explained in the legislative record at the time the provision first appeared. However, the provision was soon referred to as the "so-called 'in-lieu tax'" provision. *See Surface Transportation Act of 1974: Report on H.R. 5385 by the Committee on Interstate and Foreign Commerce, Together With Additional and Minority Views,* No. 93-1381, 93d Cong., 2d Sess. 35-36 (1974).

In the Senate, the "any other tax" provision appeared later than in the House.[17] In fact, as late as October 1975, some of the Senate's earlier versions of the 4R Act did not contain an "any other tax" provision. *See, e.g., Hearings Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce on Legislation Relating to Rail Passenger Service,* No. 94-31, 94th Cong., 1st Sess., Part 5, at 1553 (1975)(hereinafter "Hearings"). Consequently, before the Senate Subcommittee on Surface Transportation in October 1975, Stephen Ailes, the President of the Association of American Railroads, urged the Senate to include such a provision to protect railroads against the imposition of discriminatory taxes "in lieu of" property taxes:

> We suggest that the bill should be amended by adding a fourth provision, namely, one against taxes that are in lieu of discriminatory property taxes that are covered in the first three prohibitions listed above.

Hearings, at 1837.

Stuart Johnson, on behalf of the New York Dock Railway, also testified in favor of the "any other tax" provision. He stated that the provision was necessary to protect the New York Dock Railway against a New York City gross receipts tax applicable to public utilities, a tax imposed in lieu of a property tax. *Hearings*, at 1883. The Senate apparently heeded these requests to protect railroads against discriminatory "in-lieu" taxes because the "any other tax" provision found its way into the final Senate bill that became the 4R Act. *See* S. 2718, 94th Cong., 1st Sess. (1975).

In the House in late 1974, after the addition of the "any other tax" provision, Representative Long of Louisiana raised his concern about the proposed legislation's application to certain property tax exemptions provided to various industries in Louisiana to encourage economic development. The reported colloquy between Representative Long

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[17]The "any other tax" provision first appeared in a Senate bill on June 5, 1975. *See* S. 1876, 94th Cong., 1st Sess. (1975).

and several major proponents of the legislation indicates that the proponents thought its limitations on state taxation were directed only to "certain abuses" other than exemptions:

> Mr. LONG of Louisiana. . . .
>
> As we know, a number of States, and particularly some of the Southern States, one of which is my own State of Louisiana, granted exemptions from ad valorem taxes to various industries on a temporary basis so that that State could build an industrial base. I have read over title II. I do not think it possible, but I wanted the views of these three gentlemen: Could it be possibly interpreted as precluding the special property tax incentives such as the one which has been given by the State of Louisiana to a new industry for a limited period of time, in order to encourage economic development within the State?
>
> Mr. STAGGERS [the chief sponsor of the 4R Act]. In response to the gentleman from Louisiana, I can say that we do not touch on that in any way or prohibit it. The only thing we touched on was discriminatory transportation. I know that there are certain States that will give industries that come in and settle there certain tax benefits. We do not go into that at all. We certainly have no intention of banning that practice.
>
> . . .
>
> Mr. ADAMS [of Washington]. . . .
>
> I want to assure the gentleman . . . that this provision is not one that would change or affect the practice that the gentleman from Louisiana has outlined. The purpose of this section is to provide that the States simply plug the transportation industry into their tax system, as they do other industry, so that if we have a rate for commercial and industrial property, this rate that we generally apply in the State applies to transportation property with a plus or minus 5 percent.
>
> In other words, we can charge them 5 percent more. *It is directed only at certain abuses that have grown up in the country where a particular State or county, because it had somebody who was not a local citizen and did not vote there but was just passing through as an interstate carrier, would tax them more heavily than their local people because they did not vote.*
>
> I think the gentleman can be assured that this provision would not affect these specific exemption-type industrial development programs that he has outlined.
>
> . . .
>
> Mr. KUYKENDALL [of Tennessee]. . . . I would concur with the statements of the chairman and the gentleman from Washington. It is my understanding . . . that such arrangements made in any State do not change the tax structure of that individual locality. They are exceptions in the structure. We are referring only to the structure in this legislation.

120 CONG. REC. 38,734 (1974)(emphasis added).

A House report from December 1975 (shortly before passage of the 4R Act), discusses the intent of the soon-to-be enacted legislation. This report directly expresses that its purpose was to end "discriminatory property and 'in lieu' taxation":

> Specifically, this section amends Part I of the Interstate Commerce Act to include a new section which would make unlawful certain state taxation activities, or actions by any subdivision or agency of a state. These actions include: (1) assessment of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other commercial and industrial property (in the assessment jurisdiction) bears to the true market value of all other commercial and industrial property[;] (2) the collection of any tax on the portion of such assessment; (3) the collection of any ad valorem property tax on such transportation property at a higher tax rate than the tax rate generally applicable to commercial and industrial property in the taxing district; *(4) the imposition of any other tax which discriminates against a common or contract carrier regulated by the Interstate Commerce Act (the so-called "in-lieu tax").*
>
> . . .

> The Committee found that railroads are overtaxed by at least $50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, *the Committee believes discriminatory property and "in lieu" taxation should be ended.*

Railroad Revitalization and Regulatory Reform Act of 1975: Report of the Committee on Interstate and Foreign Commerce on H.R. 10979, Together with Supplemental and Dissenting Views, No. 94-725, 94th Cong., 1st Sess. 76-78 (1975)(emphasis added).[18]

The final part of the legislative record providing insight about the purpose of the "any other tax" provision is found in *Railroad Revitalization and Regulatory Reform Act of 1976: Report of the Committee on Conference on S. 2718*, No. 94-595, 94th Cong., 2d Sess. 165-66 (1976), which discusses the purpose of the state tax discrimination provisions in H.R. 10979[19] as follows:

> Part I of the Interstate Commerce Act was amended to include a new section making unlawful ad valorem State or State subdivision taxation activities. Such prohibited tax practices included (1) overvaluation; (2) collection of an unlawful tax; (3) collection of any ad valorem property tax at a higher rate than the

[18]In *Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123 (1987) this Court cited from these same pages of the 4R Act's legislative record in discussing the phrase "in lieu tax": "This Report [*of the Committee on Interstate and Foreign Commerce on H.R. 10979*] used the phrase 'in lieu tax' to describe *special taxes on common carriers that operate differently from the generally applicable property tax schemes.* H. R. Rep. No. 94-725, pp. 77, 78 (1975)." *Id.*, at 130, n.* (emphasis added).

[19]The text of S. 2718 before the Committee on Conference, with regard to the "any other tax" provision, was virtually identical and substantively the same as the text of the "any other tax" provision in H.R. 10979.

> tax rate generally applicable to commercial and industrial property in the taxing district; or *(4) the imposition of a discriminatory "in-lieu tax"*.

(emphasis added).

In sum, review of the legislative history reveals that every explanatory reference to the "any other tax" provision in the record is to restrictions on "in lieu taxes." No reference or discussion in the legislative history indicates that subsection (b)(4) was intended to address personal property tax exemptions. Thus, although the legislative history is sparse, what legislative history there is supports a plain reading of the unambiguous language of § 11503(b) and the conclusion that Congress did not intend through subsection (b)(4) to address claims alleging property tax discrimination.

We would note by way of conclusion that the decision below demonstrates a further lack of precision by the lower courts in applying the careful distinctions in the language Congress has utilized. The Ninth Circuit's opinion broadly suggests *any* non-railroad taxpayer may claim discrimination under subsection (b)(4) merely by demonstrating that a tax to which it is subject has some "indirect effect" on a rail carrier. *ACF Indus., Inc. v. Department of Rev.*, 961 F.2d 813, 817-18 n.2 (9th Cir. 1992).[20]

[20]However, subsection (b)(4) prohibits the imposition of *another* tax that discriminates against a "rail carrier." In clear contrast, subsections (b)(1)-(3) protect from ad valorem property tax discrimination "rail transportation property," elsewhere defined in 49 U.S.C. § 11503(a)(4) as "property . . . *owned or used* by a rail carrier providing transportation subject to the jurisdiction of the Commission under [49 U.S.C. §§ 10501-10505]" (emphasis added). Thus, Congress expressed its plain intent that subsections (b)(1)-(3) would protect "rail transportation property" from discriminatory ad valorem property taxes regardless of whether a rail carrier owns the property or pays the tax. *See, e.g., General Am. Transp. Corp. v. Louisiana Tax Comm'n*, 680 F.2d 400 (5th Cir. 1982) (Section 11503(b)(1) protects specialty railroad cars owned by carlines and leased to shippers, who in turn pay railroads to carry these cars over railroad tracks in interstate commerce).

If subsection (b)(4) is incorrectly read to extend to taxes indirectly imposed on railroads, courts will be required to assess the degree to which various taxes imposed on a myriad of other potential non-railroad plaintiffs might "affect" railroads and to draw a line at some point beyond which the indirect effect is too tenuous to state a claim.[21] Congress could hardly have intended in subsection (b)(4) to extend protection from "discriminatory" taxation of any kind to every entity doing business with a railroad or, as illustrated by some of the carline plaintiffs in this case (which lease equipment to others than railroads), to every entity doing business with a person doing business with a railroad.[22]

IV. None of the Arguments Historically Raised by Railroads and Carlines in 4R Act Actions Supports Rejection of the Plain Language of Section 11503(b)(4).

Faced with the plain language of § 11503(b)(4), railroads and carlines in 4R Act actions have historically raised three arguments to push for a broad construction of the statute to vitiate the express wording of the subsection. First, the industry argues that the word "another" more logically refers to other forms of discrimination, not other taxes. However, the argument improperly requires rearrangement of the words in subsection (b)(4). *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 645 (1990)("[B]asic principles of statutory construction [ ] require giving effect to the meaning and placement of the words chosen by Congress"). Congress has constructed subsection (b)(4) to apply to "another tax," not to any other kind of discrimination. As the Court recently explained:

> Just as we are not at liberty to seek ingenious analytical instruments to avoid giving a congressional enactment the broad scope its language and origins may require, so too are we not at liberty to recast this statute to expand its application beyond the limited reach Congress gave it.

Ngiraingas v. Sanchez, 495 U.S. 182, 192 (1990)(citations and internal quotations omitted).

A second argument repeatedly asserted is that the 4R Act was intended to prevent tax discrimination against railroads in any form whatsoever and that the legislative history and broad language of the 4R Act demonstrate Congress' overriding concern with discrimination in all of its guises. The former of these propositions originated in *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.) *cert. denied*, 454 U.S. 1086 (1981) and the latter in *Southern Ry. v. State Bd. of Equalization*, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Both propositions contradict the language of § 11503 and find no support in the legislative history.

In *Ogilvie*, the Eighth Circuit cited neither the language of § 11503 nor the legislative history it specifically relied upon for the proposition that the purpose of the 4R Act is "to prevent tax discrimination against the railroads in any form whatsoever." 657 F.2d, at 210. The Eighth Circuit's broad proposition is undermined, moreover, by the plain language of § 11503(b)(4) which applies to "another tax" and not "any tax." It also is contradicted by § 11503(a)(4) which expressly permits states to treat noncommercial and non-industrial, agricultural land, timber

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[21]For example, Congress could not have intended subsection (b)(4) to allow a lumber company, a small portion of whose business consists of selling railroad ties to a rail carrier, to challenge in federal court a generally applicable gross receipts tax imposed on the lumber company on the theory that the tax exempts proceeds from the sale of real estate but not proceeds from the sale of railroad ties. *See* WASH. REV. CODE § 82.04.390.

[22]While the issue is not before the Court in this case, an assumption that respondents are proceeding as rail carriers challenging ad valorem property taxes imposed on their own rail cars should be regarded as just that and not as a binding *sub silentio* holding by this Court that persons other than rail carriers can bring suit under § 11503(b)(4). *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989).

land and property not subject to a property tax differently than property owned or used by rail carriers. Finally, it is shown to be patently wrong by the legislative history which is discussed in Section III of this argument.

The Eleventh Circuit, in contrast to the Eighth Circuit, at least cited the legislative history it relied upon. *Southern Ry.*, at 528. The cited legislative history, however, fails to support the broad proposition asserted. For example, S. Rep. No. 630, 91st Cong., 1st Sess. 15 (1969), provides:

> The committee wishes to emphasize that this bill would in no way alter the freedom of a State to tax its taxpayers so long as interstate carriers are accorded equal treatment with other taxpayers. *In the majority of States that now grant equal justice to all taxpayers, State property tax assessments, collections or rates would in no way be affected by passage of this bill.*

(emphasis added).[23] The quoted passages from S. Rep. No. 630, as well as the other legislative history discussed in this brief, show that Congress considered that the 4R Act's impact on states would be limited to certain abuses practiced by some, but not all, of the states. Certainly, nothing in the

[23]The same report at p. 6 provides:

> The 1960 study report to this committee discussed two alternative recommendations to eliminate discriminatory tax practices. The first would be a Federal law to exempt the right-of-way of railroads and pipelines from ad valorem property taxation by the States. . . . The second alternative discussed was an antidiscriminatory tax bill such as S. 2289. The study report favorably commented on such a bill as follows (p. 466):
>
> > . . . The proposal in no way alters the freedom f the State to tax its taxpayers as in its discretion it deems best, so long as such carriers are accorded equal treatment with other taxpayers.
> >
> > Passage by the Congress of such a bill would not change the substantive effect of the tax laws of the several States because, without known exception, all States, either by constitutional safeguard or legislative provision declare it to be State law that taxpayers within its jurisdiction shall be taxed uniformly.

legislative history supports the notion that Congress intended § 11503 to be broad remedial legislation to be used by the courts—as the Ninth Circuit did in this case—to strike down all property taxation of carlines.

The legislative history does reflect Congress' concern that railroads were paying a disproportionate and unfair proportion of the cost of state government in certain states. *See* H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975). However, railroads actively participated in Congress' lengthy study of discriminatory taxation, submitting numerous reports to Congress on the subject during the fifteen years Congress considered the problem. Yet, nowhere in these reports or in other legislative history is the states' practice of exempting certain personal property mentioned as part of the problem § 11503(b)(4) was enacted to solve.

This omission is significant because, as the railroads and carlines themselves point out, since the early 1960's an increasing number of states have established exemptions for classes of business personalty—*e.g.*, business inventories and agricultural personalty. Because of this, railroads and carlines argue that subsection (b)(4) must be read expansively to address what they now see as a problem. However, had the states' exemption of certain personal property been viewed as a problem, then Congress undoubtedly would have prohibited such exemptions specifically, rather than relying on general language to override what it expressly permitted in the three subsections addressing property taxes.

In *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827 (1978), this Court stated:

> We may accept the proposition that agriculture has changed in the intervening 55 years, but, as the second Mr. Justice Harlan said, when speaking for the Court in another context, a statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes." *United States v. Sisson*, 399 U.S. 267, 297 (1970). Considerations of this kind are for the Congress, not the courts.

If the exemption of certain personal property has become a problem since the enactment of the 4R Act, as the railroads and carlines claim, then they should seek relief in Congress, instead of asking this Court to rearrange or ignore the language of § 11503(b)(4) to better suit their "present-day tastes."[24]

The third argument of railroads and carlines contends that a refusal to include "exemption discrimination" within the purview of subsection (b)(4) would produce an absurd result that Congress could not have intended.[25] A review of the federal statutes protecting motor carriers and air carriers defeats this argument. Both the Motor Carrier Act of 1980 (codified at 49 U.S.C. § 11503a and prohibiting discriminatory property taxes on motor carriers) and the Airport and Airway Improvement Act of 1982 (codified at 49 U.S.C. § 1513(d) and prohibiting discriminatory property taxes on air carriers) contain provisions comparable to § 11503(b)(1)-(3) and both acts contain the same comparison class as provided in § 11503(a)(4). *See* 49 U.S.C. § 11503a(b)(1)-(3) and (a)(4);

[24]*See Union Bank v. Wolas,* 112 S. Ct. 527, 531 (1991) ("The fact the Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning").

[25]Even the United States argues that property tax exemptions must "be considered in determining whether the State has . . . effected discrimination against rail carriers" under subsection (b)(4). According to the United States, "[a]ny other interpretation of Subsection (b)(4) would require the absurd conclusion that the States may exempt all commercial property other than railroad property from its property tax base without violating the statute." Brief for the United States as Amicus Curiae, on Pet. for Cert., at 10-11. The United States apparently agrees, however, that subsections (b)(1)-(3) plainly do not prohibit the complete exemption of nonrailroad property because exempt property is property not "subject to a property tax levy". *See id.,* at 5 n.10, 10.

49 U.S.C. § 1513(d)(1)(A)-(C) and (d)(2)(D).[26] Both acts, however, are limited to property taxes and neither act contains any provision comparable to § 11503(b)(4). Thus, Congress plainly intended in these acts to permit precisely the result that railroads, carlines and the United States characterize here as "absurd."

Only in the exceptional case will this Court depart from the literal or usual meaning of the words of a statute:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, and those intentions must be controlling. . . . This, however, is not the exceptional case.

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (citations and internal quotations omitted). Nor is this the case for application of the exception as urged by the railroads and carlines. Construing the plain language of § 11503(b)(4) to only apply to non-property taxes is not demonstrably at odds with any intention of Congress to be found in the legislative history of the 4R Act. Congress chose to omit any provision comparable to subsection (b)(4) from both 49 U.S.C. § 11503a and 49 U.S.C. § 1513(d). Therefore, to construe § 11503(b)(4) to apply only to non-property taxes is merely to acquiesce in the Congressional policy choice evinced by its plain language. That result cannot be said to be absurd.

In the past, the Court has rejected invitations, such as the one offered by respondents here, to fill the interstices of existing law. *Andrus v. Sierra Club*, 442 U.S. 347, 356 (1979)(The Court will "decline to fracture" clear language of

[26]In *Western Air Lines, Inc. v. Board of Equalization,* 480 U.S. 123, 131 (1987) this Court recognized that the antidiscrimination provisions of these two acts protecting motor carriers and airlines are "modeled on similar provisions in the 4-R Act[.]"

a statute to fashion from fragments a rule that accords with the "common sense and the public weal"); *Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 617 (1943)(Judicial extension of statute beyond ordinary meaning not warranted simply because experience demonstrates need for a more comprehensive law); *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930)(Rejection of literal meaning of language in favor of one reflecting supposed spirit of the statute may transgress boundary between judicial and legislative power).

The Court should similarly decline the current overture. There is no warrant for finding that the matter of property taxes or exemptions is addressed in § 11503(b)(4). The application of a clear statement requirement in cases like this is further justified if Congress is to be discouraged from resorting to ambiguity (if, indeed, there is ambiguity in this case) "as a cloak for its failure to accommodate the competing interests bearing on the federal-state balance."[27]

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[27] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-8 (2d ed. 1988). Allowing parties to seek in the courts what was unobtainable legislatively is unsatisfactory in the Commerce Clause context where courts are provided with "no trenchant criteria for striking the balance that Congress managed to avoid." *Id.* The comment is particularly apt where discrimination for purposes of § 11503(b)(4) is left undefined.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed for the reason that 49 U.S.C. § 11503(b)(4) does not apply to ad valorem property taxes.

DATED this 15th day of July, 1993.

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APPENDIX

49 U.S.C. § 11503

Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(c) Notwithstanding section 1341 of title 28 [28 USCS § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to a property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

SECTION 306

Prohibiting discriminatory tax treatment of transportation property

SEC. 306. Part I of the Interstate Commerce Act (49 U.S.C. 1 et seq.), as amended by this Act, is further amended by inserting therein a new section 28, as follows:

SEC. 28. (1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention

of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term—

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.